Planning Organizations Could Manage Regional PACE Programs

Jeremy Brown July 3, 2013

Texas Governor Rick Perry recently signed new PACE enabling legislation into law. S.B. 385 overhauls existing statutes that authorized PACE in Texas but never gave rise to any actual PACE programs.

Municipalities and counties can now enter into PACE contractual assessments for water and energy efficiency improvements with owners of real property. (For more background on PACE and the bill, please see this recent Energy Center white paper.)

A common issue in local government law is the need to balance economies of scale against local accountability. You can see this play out in discussions about school district and city-county consolidations, neighborhood councils and Austin's recent conversion to single-member districts.

The local governments here in Texas with an interest in PACE will have to reckon with that issue when determining whether to launch their own programs or to collaborate with others on broader, multi-jurisdictional programs.

PACE took off in the late 2000s, and the early PACE programs were almost exclusively single-jurisdiction. (Examples: Berkeley, CA; Babylon, NY; Boulder County, CO.) But the trend since then has been toward inter-governmental efforts.

California has a joint powers program, CaliforniaFirst, that has attracted more than 100 participant cities and counties. Regional PACE programs have taken root in both Central and South Florida, and Connecticut recently kicked off a statewide program.

These collective programs offer several advantages. If they use public financing — rather than an open-market model that allows prospective borrowers to directly seek out preferred lenders — they will likely need to capitalize by issuing bonds; multi-jurisdictional programs could produce better bond ratings and lower interest rates. And even under an open-market model, collaboration could reduce administrative costs for participating local governments.

The downside is that making PACE multi-jurisdictional does, in a sense, put it at a further remove from the residents of each of participating jurisdiction. But it is not as though residents are cut out of the PACE process. To participate, a local government must first pass an ordinance. Residents could always support or oppose participation or, down the line, appeal to local leaders to pull out of a PACE program.

In theory, residents might have less sway over the design of a multi-jurisdictional program than over programs within their individual jurisdictions. But in practice, even individual jurisdictions would have to operate within the parameters of SB 385 and established PACE best practices, and they would probably lean heavily on model documents. (For an example of this sort of policy convergence, consider the similarities among plastic bag bans in Texas.)

In short, multi-jurisdictional PACE programs may not actually be any less accountable than single-jurisdiction programs; and to the extent that they are, that loss of accountability will probably be minor relative to the gains in administrative savings. For that reason, there has been discussion in Texas of councils of government (COGs) operating regional PACE programs.

Chapter 391 of the Local Government Code allows for the creation of COGs and similar entities such as regional planning commissions. (In fact, in large metropolitan areas like Dallas and Houston, the regional planning commissions are COGs.)

Chapter 391 encourages COGs to focus on planning. "The general purpose of a commission is to make studies and plans to guide the unified, far-reaching development of a region, eliminate duplication, and promote economy and efficiency in the coordinated development of a region." Local Gov't Code § 391.001.

Operating a PACE program – that is, acting as a lender for energy and water efficiency projects – is somewhat removed from land use and transportation planning, though no more so than is the case with some other COG endeavors. *E.g.*, *Sanders-Burns v. City of Plano*, 594 F.3d 366, 370 (5th Cir. 2010) (observing that the North Central Texas Council of Governments (NCTCOG), which serves the greater Dallas Fort Worth area, runs a regional police academy); *City of Frisco v. Comm'n on State Emergency Communs.*, 2009 Tex. App. LEXIS 5314, 5-6 (Tex. Ct. App. July 9, 2009) (explaining that Frisco contracted with NCTCOG for 911 services).

Under Chapter 391, COGs have authority to do more than plan. Section 391.005 allows COGs, for instance, to "contract with a participating governmental unit to perform a service if: (1) the participating governmental unit could contract with a private organization without governmental powers to perform the service; and (2) the contract to perform the service does not impose a cost or obligation on a participating governmental unit not a party to the contract."

Depending on the structure of its PACE program, the COG may only perform functions that a private entity could perform, leaving the strictly governmental functions like tax collection to participating member governments. Especially in an open-market model, the chief role COG's would probably play would be as aggregators.

Alternatively, to the extent that multi-jurisdictional PACE would require COGs to perform uniquely governmental functions, the COGs would have authority to do so through their interlocal contracting authority. Under Gov't Code § 791.011, "[a] local government may contract or agree with another local government … to provide a governmental function or service that each party to the contract is authorized to perform individually." A "local government" is defined as a "county, municipality, special district, junior college district, or other political subdivision of this state or another state" and may include "a combination of two or more such entities." Gov't Code § 791.003.

A COG would merely be acting in its capacity as a combination of local governments and providing PACE lender and/or administrative functions that S.B. 385 expressly authorizes municipalities and counties to perform.

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